

| | |
|---|-----------|
| I. REAL PARTY IN INTEREST | 1 |
| II. RELATED APPEALS AND INTERFERENCES | 1 |
| III. STATUS OF CLAIMS..... | 2 |
| IV. STATUS OF AMENDMENTS | 2 |
| V. SUMMARY OF CLAIMED SUBJECT MATTER..... | 2 |
| VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL..... | 2 |
| VII. ARGUMENT..... | 3 |
| VIII. CLAIMS APPENDIX | 15 |
| IX. EVIDENCE APPENDIX | 20 |
| X. RELATED PROCEEDINGS APPENDIX | 21 |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

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| In re Application of | : | Customer Number: 50594 |
| | : | |
| William PAGAN | : | Confirmation Number: 9436 |
| | : | |
| Application No.: 10/092,840 | : | Group Art Unit: 2173 |
| | : | |
| Filed: March 7, 2002 | : | Examiner: M. Roswell |
| | : | |
| For: PULL-DOWN MENU MANIPULATION OF MULTIPLE OPEN DOCUMENT WINDOWS | | |

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This Appeal Brief is submitted in support of the Notice of Appeal filed September 5, 2006, wherein Appellant appeals from the Examiner's rejection of claims 1-14.

I. REAL PARTY IN INTEREST

This application is assigned to IBM Corporation by assignment recorded on March 7, 2002, at Reel 012681, Frame 0624.

II. RELATED APPEALS AND INTERFERENCES

Appellant is unaware of any related appeals and interferences.

III. STATUS OF CLAIMS

Claims 1-14 are pending in this Application. Claims 1-11 have been five-time rejected, and claims 12-14 have been once rejected. It is from the multiple rejection of the claims that this Appeal is taken.

IV. STATUS OF AMENDMENTS

The claims have not been amended subsequent to the imposition of the Fourth Office Action dated June 5, 2006 (hereinafter the Fourth Office Action).

V. SUMMARY OF CLAIMED SUBJECT MATTER

Referring to Figure 3 and independent claims 1 and 7, a method for manipulating multiple open document windows 220 through a pull-down menu 240 of an activated open document 220E is disclosed. A pull-down menu 240 is created in the activated open document window 220E, and the pull-down menu 240 includes a listing of open document windows and corresponding interactive user interface elements 250 (page 9, lines 8-10 of Appellant's disclosure). Upon the activation of one of the interactive user interface elements 250, a pre-defined window manipulation operation, separate from a focus change operation, is performed upon an inactive open document window 220D corresponding to the activated interactive user interface element 250 (page 9, lines 10-15). Referring also to claim 10, the corresponding interactive user interface elements are positioned separately from the listing of selected operating system services

Referring to Figures 2 and 3 and independent claim 4, a system for manipulating multiple open document windows 220 is disclosed. The system includes a pull-down menu 240 with a

list of open document windows in the pull down menu 240 (page 8, lines 1-4), a set of activatable interactive user elements 250 (page 9, lines 1-5), and an event handler 310, 320, 330. The pull-down menu 240 is disposed in an active open document window 220E (page 9, lines 8-10). The set of activatable interactive user elements 250 are disposed in the pull-down menu 240, and each activatable interactive user element 250 correspond to one of the listed open document windows 220 (page 9, lines 8-1). Each of the activatable interactive user elements 250 have a screen position in the pull-down menu 240 which is adjacent to the corresponding listed open document window (page 8, lines 5-11). The event handler is configured to post pre-defined window manipulation events, separate from a focus change operation, to inactive open document windows 220 associated with activated ones of the activatable interactive user elements 250 (page 9, lines 10-15).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

1. Claims 1-14 were rejected under the first paragraph of 35 U.S.C. § 112; and
2. Claims 1-14 were rejected under 35 U.S.C. § 103 for obviousness based upon Applicant's Admitted Prior Art (hereinafter Admitted Prior Art), in view of U.S. Patent No. 5,491,795 (hereinafter Beaudet).

VII. ARGUMENT

THE REJECTION OF CLAIMS 1-14 UNDER THE FIRST PARAGRAPH OF 35 U.S.C. § 112

For convenience of the Honorable Board in addressing the rejections, claims 4 and 7 stands or fall together with claim 1.

On page 2 of the Fourth Office Action, the Examiner asserted the following:

Performing a pre-defined window manipulation operation, separate from a focus change operation, upon an inactive document window, which is critical to the practice of the invention, is not enabled by the disclosure. See *In re Mayhew*, 527 F.2d 1229, 188 USPO 356 (CCPA 1976). Amended claims 1, 4, and 7 include the limitation, "performing a pre-defined window manipulation operation, separate from a focus change operation, upon an inactive document window, which is critical to the practice of the invention". The factual evidence found in applicant's specification does not support such a negative limitation. While applicant has disclosed many types of window manipulation operations, the specification fails to disclose an embodiment of the invention wherein a focus change operation is separate from other pre-defined window operations, as now required by the claims. As a result, all claims dependent on claims 1, 4, and 7 are similarly rejected.

Appellant respectfully disagrees. In this regard, reference is made to page 7, lines 8-11 of Appellant's disclosure, which for ease of reference, is reproduced below:

In this way, a selected open document window in the pull-down menu list can be manipulated through another open document without requiring activation of the selected open document window. (emphasis added)

A focus change operation, as disclosed by the Admitted Prior Art, necessarily causes the activation of the selected open document. Thus, by disclosing that the manipulation occurs "without requiring activation of the selected open document window," this disclosure enables the recited feature of "performing a pre-defined window manipulation operation, separate from a focus change operation." Therefore, Appellant respectfully submits that one having ordinary skill in the art would have recognized that Appellant's disclosure fully enables all of the limitations recited in the claims.

THE REJECTION OF CLAIMS 1-14 UNDER 35 U.S.C. § 103 FOR OBVIOUSNESS BASED UPON THE ADMITTED PRIOR ART IN VIEW OF BEAUDET

For convenience of the Honorable Board in addressing the rejections, claims 2-14 stand or fall together with independent claim 5.

Failure to establish a realistic motivation to combine

On page 3 of the Fourth Final Office, in discussing the Admitted Prior Art, the Examiner admitted the following:

However, Applicant's admitted prior art fails to explicitly teach performing a pre-defined window manipulation operation, separate from a focus change operation, upon an inactive open document window.

In the subsequent paragraph on page 3 of the Fourth Final Office, the Examiner asserted the following with regard to the teachings of Beaudet, and in the paragraph spanning pages 3 and 4 and in the first full paragraph on page 4 of the Fourth Final Office, the Examiner presented the following obviousness analysis:

Therefore, it would have been obvious to one of ordinary skill in the art, having the teachings of the admitted prior art and Beaudet before him at the time the invention was made to modify the pre-defined window manipulation through pull-down menus of the admitted prior art with the interactive window list control system of Beaudet, in order to obtain a pull-down menu listing windows capable of being operated upon through manipulation of an interactive element in the menu.

One would be motivated to make such a combination due to the fact that the pull-down menu presents a list of windows to the user, as does the window control management system of Beaudet. One would further be motivated to make such a combination for the advantage of the increased functionality provided by Beaudet over the simple focus change allotted by Applicant's admitted prior art. See Beaudet, col. 2, lines 1-9.

Although the Examiner appears to be asserting two separate motivations to combine, it is apparent that these separate motivations to combine are, in fact, intended to be combined.

The first asserted motivation to combine is "due to the fact that the pull-down menu presents a list of windows to the user, as does the window control management system of Beaudet." In response, Appellant notes that the mere identification of claim features in disparate references does not establish the requisite realistic motivation to support the ultimate legal conclusion of obviousness under 35 U.S.C. § 103.¹ Obvious to try is not the standard.² Instead,

¹ Grain Processing Corp. v. American-Maize Products Co., 840 F.2d 902, 5 USPQ2d 1788 (Fed. Cir. 1988).

not only does the legal conclusion of obviousness under 35 U.S.C. § 103 require a suggestion, but the analysis must establish a reasonable expectation of success as to a particular benefit.³

The Examiner, however, has not associated a particular benefit with the first asserted motivation to combine. Instead, an asserted benefit is associated with the second asserted motivation to combine, which is "the advantage of the increased functionality provided by Beaudet over the simple focus change allotted by Applicant's admitted Prior Art." The Examiner's asserted factual basis for this asserted benefit is column 2, lines 1-9 of Beaudet, which for ease of reference, is reproduced below:

Second, often it is desirable to provide a convenient means of performing operations on the actual window through its representative icon or miniature window. The present invention not only provides a means for performing operations (e.g., sizing, moving, etc) on the actual window using an icon or miniature window, but these miniature window representations also dynamically maintain the state of the actual window (as opposed to maintaining a static state which must be periodically and explicitly refreshed).

At the outset, Appellant notes that the Examiner's asserted benefit is based upon a generalization. The passage cited by the Examiner is found in the "Background of the Invention" portion of Beaudet regards a desire by Beaudet "to provide a convenient means of performing operations on [an] actual window through its representative icon or miniature window." It has been repeatedly held by the Federal Circuit that in order to establish the requisite motivation, the Examiner must make "clear and particular" factual findings as to a specific understanding or specific technological principle which would have realistically impelled one having ordinary skill in the art to modify a particular prior art reference to arrive at the claimed invention based upon facts, not generalizations.⁴

² In re O'Farrell, 853 F.2d 894, 7 USPQ2d 1673 (Fed. Cir. 1988); In re Fine, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988); In re Dow Chemical Co., 837 F.2d 469, 5 USPQ2d 1529 (Fed. Cir. 1988).

³ In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

⁴ Ruiz v. A.B. Chance Co., 234 F.3d 654, 57 USPQ2d 1161 (Fed. Cir. 2000); Ecotech Inc. v. Southern California

The Examiner, however, has failed to factually establish a nexus between the specific proposed modification to the Admitted Prior Art based upon the teachings of Beaudet and the Examiner's asserted benefit. As will be discussed in greater detail below, the asserted benefit (i.e., to provide a convenient means of performing operations on a window through a representative icon or miniature window) does not necessarily lead to the proposed modification.

Improperly identifying the teachings of Beaudet

In Graham v. John Deere Co.,⁵ the Supreme Court set forth the factual inquiries that are to be applied when establishing a background for determining obviousness under 35 U.S.C. 103. are employed when making an obvious-type double patenting analysis. These factual inquiries are summarized as follows:

- (A) Determine the scope and content of a patent claim relative to a claim in the application at issue;
- (B) Determine the differences between the scope and content of the patent claim as determined in (A) and the claim in the application at issue;
- (C) Determine the level of ordinary skill in the pertinent art; and
- (D) Evaluate any objective indicia of nonobviousness.

Appellant respectfully submits that the Examiner has asserted that Beaudet teaches more than what Beaudet actually teaches.

Edison, Co., 227 F.3d 1361, 56 USPQ2d 1065 (Fed. Cir. 2000); *In re Kotzab*, 217 F.3d 1365, 55 USPQ 1313 (Fed. Cir. 2000); *In re Dembiczak*, 175 F.3d 994, 50 USPQ2d 1614 (Fed. Cir. 1999).

⁵ 383 U.S. 1, 148 USPQ 459 (1966)

On page 3 of the Fourth Office Action, the Examiner asserted that "it would have been obvious ... to modify the pre-defined window manipulation through pull-down menus of the admitted prior art with the interactive window list control system of Beaudet" (emphasis added). Also on page 3, the Examiner asserted that the pre-defined window manipulation is "taught as the change of focus from the active window to the selected inactive window." In this regard, Appellant notes that the Examiner has failed to recognize the difference between what is disclosed and what is taught by a particular reference.

Instead, the Examiner appears to be confusing the concept described regarding genus-species situation in M.P.E.P. § 2131.02 with how a teaching within a particular reference may be interpreted with regard to a rejection based upon 35 U.S.C. § 103. In the genus-specie instance, a very specific teaching of species within a particular reference is capable of identically disclosing, within the meaning of 35 U.S.C. § 102, a claim to a generic feature (i.e., the genus). However, although the specific disclosure meets the requirements of 35 U.S.C. § 102 in identically disclosing the generic feature, this specific disclosure does not teach the genus.

The difference between teaching and disclosing is evident in the following analogy. The teaching of using a statin to lower the cholesterol within a mouse, is sufficient to identically disclose a claim directed to using a hypolipidemic agent in mammals to lower cholesterol, since a statin is a class of hypolipidemic agents and a mouse is a species of the genus mammals. However, it cannot be argued that the disclosure of using a statin to lower the cholesterol within a mouse teaches the broad notion of using hypolipidemic agents in mammals to lower cholesterol. To do so would improperly synthesize a broad teaching from a narrow teaching in

the prior art, which one having ordinary skill in the art at the time of the invention would not recognize the prior art as actually teaching.⁶

The impropriety of this manipulation of what the Admitted Prior Art actually teaches becomes evident when the Examiner asserts how Beaudet would modify the teachings of the Admitted Prior Art. Instead of the Examiner asserting that Beaudet teaches modifying "the change of focus from the active window to the selected inactive window" (i.e., the narrow yet actual teachings of the Admitted Prior Art), the Examiner asserts Beaudet teaches modifying "the pre-defined window manipulation through pull-down menus (i.e., the improperly broadened asserted teachings of the Admitted Prior Art). This difference is relevant to how the Examiner's asserts the Admitted Prior Art would have been modified in view of Beaudet.

The Examiner's proposed modification is that Beaudet would modify the pre-defined window manipulation through pull down menus of the Admitted Prior Art to include other pre-defined manipulation operations since these other pre-defined manipulations operations would presumably be just additive to the pre-existing window manipulations operations already disclosed by the Admitted Prior Art. In simpler terms, the Examiner asserts that the Admitted Prior Art teaches using a pull down menu to perform a particular one of a certain class of operations, and it would have been obvious to modify the pull down menu of Admitted Prior Art to additionally include different operations within the same class of operations to that already taught.

⁶ Although the requirement that the applied prior art must sufficiently describe Applicant's claimed invention to place the invention within the possession of one having ordinary skill presupposes the knowledge of one skilled in the art of the claimed invention, that presumed knowledge does not grant a license to read into the prior art references teachings that are not there. Motorola, Inc. v. Interdigital Tech. Corp., 43 USPQ2d 1481 (Fed. Cir. 1997).

However, as noted above, the Examiner has not established that the Admitted Prior Art teaches the notion of a broad class of operations (i.e., pre-defined window manipulations operations). Instead, the Admitted Prior Art only teaches the narrow change of focus from the active window to a selected window.

By improperly broadening the teachings found in the Admitted Prior Art, the Examiner has made the analytical connection (i.e., other pre-defined manipulations operations would presumably be just additive to the pre-existing window manipulation operations already disclosed by the Admitted Prior Art) between the Admitted Prior Art and Beaudet much less complicated. Since the Examiner has asserted that the separate operations respectively taught by the Admitted Prior Art and Beaudet are within the same class of operations, the Examiner is relying upon the operations being within a common class instead of establishing that one having ordinary skill in the art would have recognized that teachings regarding the window manipulation operations disclosed by Beaudet would be applicable to the change of focus operation disclosed by the Admitted Prior Art. Since the Examiner's analysis has not factually established this asserted connection between the Admitted Prior Art and Beaudet (i.e., both are directed to pre-existing window manipulation operations), the Examiner's analysis is fatally flawed.

Therefore, for the reasons stated above, the Examiner has not properly determined the differences between the scope and content of what is claimed and the scope and content of what is actually taught by the applied prior art. Moreover, this failure by the Examiner to properly

determine the scope and content of the applied prior art has infected the Examiner's analysis such that the Examiner's analysis is not properly based upon the actual factual teachings of the applied prior art.

Applied prior art, even if combined, would not result in claimed invention

Appellant respectfully submits that even if one having ordinary skill in the art were modified to modify the Admitted Prior Art in view of Beaudet, the claimed invention would not result.

As discussed in M.P.E.P. § 2141.02(VI), "[a] prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention" (emphasis added).⁷ In considering Beaudet as a whole, Beaudet considers his invention to be "a single control window container on a computer display containing representations of product windows or related file windows" (column 3, lines 18-20). Beaudet further states that "[t]he control window container enables a user to control each individual product window by using or manipulating the representations and by integrating together the individual windows" (column 3, lines 22-25). The control window 10b includes miniature windows 51, 55 that correspond to product windows 31, 35 that are separate from the control window 10b (column 4, lines 59-65, and Fig. 3).

Comparing the teachings of the Admitted Prior Art (i.e., Fig. 1) and Fig. 1 of Beaudet, it is readily apparent that the only major difference between these teachings is the inclusion of the

⁷ W. L. Gore & Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

control window 10 in Fig. 1 of Beaudet. Therefore, even if one having ordinary skill in the art were motivated to modify the Admitted Prior Art, one having ordinary skill in the art would have modified Beaudet to include the entire control window 10 of Beaudet within the Fig. 1 of the Admitted Prior Art. In so doing, the control window 10 of Beaudet would provide for all of the Examiner's asserted benefits for the proposed combination. Moreover, such a modification to the Admitted Prior Art would take into consideration the teachings of Beaudet, as a whole, which contemplate the use of a separate window to perform operations on other windows.

Appellant further notes that certain of the teachings relied upon in the Admitted Prior Art are also found within Beaudet. The Examiner relies upon the Admitted Prior Art to teach "the ability to select a window through the pull-down menu using point-and-click methods" (see page 3 of the Fourth Office Action). This feature is shown by reference numeral 140 (i.e., "window list") in Fig. 1 of Appellant's disclosure. The product windows 31, 35 of Beaudet, however, already include pull-down menus (i.e., Database, View, and Help). Thus, if the Examiner's proposed modification was obvious to one having ordinary skill in the art, then Beaudet would have made the modification to itself. The fact that Beaudet did not recognize this so-called "obviousness modification" is evidence that the claimed invention was not obvious to one having ordinary skill in the art.

In response to arguments similar to those presented immediately above, the Examiner asserted the following in the paragraph spanning pages 9 and 10 of the Fourth Office Action:

In response to applicant's arguments of pages 11-13 that the combination of applicant's admitted prior art and Beaudet fails to teach the claimed invention, the examiner respectfully disagrees. Applicant has stated that the "obvious" modification would be to include the entire control window of Beaudet in the pull down menu of applicant's admitted prior art. However, while such a combination would be one obvious modification, other such modifications do exist,

and are believed to be equally obvious, such as the inclusion of the interactive icons of Beaudet into the menu of applicant's admitted prior art. Further, applicant argues that Beaudet not performing such a modification is evidence that the claimed invention is not obvious to one of ordinary skill in the art. The examiner contends that just because a modification is obvious does not necessitate that it must be done in every instance. Therefore, the examiner feels that ample support and motivation remains for the combination and modification of applicant's admitted prior art and the Beaudet reference.

Despite these arguments, Appellant notes that the Examiner did not address Appellant's argument that when considering the teachings of Beaudet, as a whole, one having ordinary skill in the art would have modified the Admitted Prior Art to include a separate control window 10 instead of a pull-down menu. Appellant also notes that since Beaudet advocates a separate control window 10, this teaching away from the claimed invention constitutes an indicia of nonobviousness.

The Examiner's assertion that "just because a modification is obvious does not necessitate that it must be done in every instance," ignores the requirement that in rejecting a claim under 35 U.S.C. § 103, the Examiner is to establish that the claimed invention would have been obvious over the applied prior art. If, as asserted by the Examiner, that some particular benefit flows from the proposed combination, and if, as asserted by Appellant, that Beaudet was aware of the teachings of the Admitted Prior Art, then the fact that Beaudet did not arrive at the claimed invention is also indicia of nonobviousness.

Conclusion

Based upon the foregoing, Appellant respectfully submits that the Examiner's rejections under 35 U.S.C. §§ 112, 103 based upon the applied prior art is not viable. Appellant, therefore, respectfully solicits the Honorable Board to reverse the Examiner's rejections under 35 U.S.C. §§ 112, 103.

To the extent necessary, a petition for an extension of time under 37 C.F.R. § 1.136 is hereby made. Please charge any shortage in fees due under 37 C.F.R. §§ 1.17, 41.20, and in connection with the filing of this paper, including extension of time fees, to Deposit Account 50-0563, and please credit any excess fees to such deposit account.

Date: November 6, 2006

Respectfully submitted,

/Scott D. Paul/

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VIII. CLAIMS APPENDIX

1. A method for manipulating multiple open document windows through a pull-down menu of an activated open document window comprising the steps of:

creating a pull-down menu in the activated open document window comprising a listing of open document windows and corresponding interactive user interface elements; and,

responsive to the activation of one of said interactive user interface elements, performing a pre-defined window manipulation operation, separate from a focus change operation, upon an inactive open document window corresponding to said activated interactive user interface element.

2. The method of claim 1, wherein said performing step comprises the steps of:

generating a window manipulation event responsive to said activation of said interactive user interface element;

processing said window manipulation event in a message handling routine associated with the activated open document window, said processing comprising identifying said inactive open document window corresponding to said interactive user interface element, and posting a window manipulation event to said identified inactive open document window; and,

processing said posted window manipulation event in a message handling routine associated with said inactive open document window.

3. The method of claim 1, wherein said pre-defined window manipulation operation comprises a window manipulation operation selected from the group consisting of a window close operation, a print window operation, and a file save operation.

4. A system for manipulating multiple open document windows comprising:
a pull-down menu disposed in an active open document window;
a list of open document windows disposed in said pull-down menu;
a set of activatable interactive user elements disposed in said pull-down menu, each activatable interactive user element corresponding to one of said listed open document windows, each said activatable interactive user element having a screen position in said pull-down menu which is adjacent to said corresponding listed open document window; and,
an event handler configured to post pre-defined window manipulation events, separate from a focus change operation, to inactive open document windows associated with activated ones of said activatable interactive user elements.

5. The system of claim 4, wherein each said activatable interactive user element comprises a button.

6. The system of claim 4, wherein said pre-defined window manipulation events comprise close window events.

7. A machine readable storage having stored thereon a computer program for manipulating multiple open document windows through a pull-down menu, said computer program comprising a routine set of instructions for causing the machine to perform the steps of:

creating a pull-down menu comprising a listing of open document windows and corresponding interactive user interface elements; and,

responsive to the activation of one of said interactive user interface elements, performing a pre-defined window manipulation operation, separate from a focus change operation, upon an inactive open document window corresponding to said activated interactive user interface element.

8. The machine readable storage of claim 7, wherein said performing step comprises the steps of:

generating a window manipulation event responsive to said activation of said interactive user interface element;

processing said window manipulation event in a message handling routine associated with said activated open document window, said processing comprising identifying said inactive open document window corresponding to said interactive user interface element, and posting a window manipulation event to said identified inactive open document window; and,

processing said posted window manipulation event in a message handling routine associated with said inactive open document window.

9. The machine readable storage of claim 7, wherein said pre-defined window manipulation operation comprises a window manipulation operation selected from the group consisting of a window close operation, a print window operation, and a file save operation.

10. A method for manipulating multiple operating system services through a pull-down menu in an activated open document window comprising the steps of:

creating a pull-down menu in the activated open document window, said pull-down menu comprising a listing of selected operating system services and corresponding interactive user interface elements positioned separately from said listing of selected operating system services; and,

responsive to the activation of one of said interactive user interface elements, performing a pre-defined operating system services manipulation operation upon an operating system service corresponding to said activated interactive user interface element.

11. The method of claim 10, wherein said performing step comprises the steps of:

generating an operating system services manipulation event responsive to said activation of said interactive user interface element; and,

processing said operating system services manipulation event in a message handling routine associated with the activated open document window, said processing comprising identifying said operating system service corresponding to said interactive user interface element, and posting an operating system services manipulation event to said identified operating system service.

12. The method of claim 1, wherein the interactive user interface elements positioned separately from the listing of open document windows.

13. The system of claim 4, wherein the set of activatable interactive user elements positioned separately from the list of open document windows.

14. The machine readable storage of claim 7, wherein the interactive user interface elements positioned separately from the listing of open document windows.

IX. EVIDENCE APPENDIX

No evidence submitted pursuant to 37 C.F.R. §§ 1.130, 1.131, or 1.132 of this title or of any other evidence entered by the Examiner has been relied upon by Appellant in this Appeal, and thus no evidence is attached hereto.

X. RELATED PROCEEDINGS APPENDIX

Since Appellant is unaware of any related appeals and interferences, no decision rendered by a court or the Board is attached hereto.